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Municipal Corporations--Extra-Territorial Powers--Authority to Build Sewage Disposal Plant Outside the State

F. P. C.
West Virginia University College of Law

West Virginia decision in support of its holding. However, the court does cite four cases from other jurisdictions which are squarely in point and which set forth the requirement of the hearsay declarant's knowledge qualifications in unequivocal terms.[9]

A closely analogous situation exists in the case of dying declarations — another exception to the hearsay rule.[10] The West Virginia court has said that hearsay statements sought to be admitted under this exception must be such as would be admissible if the declarant were in court testifying.[11] The requirement thus laid down would seem to be applicable, by analogy, to the so-called *res gestae* exception.[12]

V. V. C.

MUNICIPAL CORPORATIONS — EXTRA-TERRITORIAL POWERS — AUTHORITY TO BUILD SEWAGE DISPOSAL PLANT OUTSIDE THE STATE. — In a recent West Virginia case the Supreme Court of Appeals *held* that a municipality had the power to acquire property and erect a sewage disposal plant in an adjoining state. *Bernard v. City of Bluefield.*[1]

The court cited as authority for its holding the only two similar decisions[2] among the few cases raising the problem of the extra-territorial exercise of powers by municipalities outside the state of their creation.

quirement [of knowledge qualifications] is in practice usually fulfilled . . . Nevertheless, in an appropriate case, it would without doubt be enforced. . . . .'' See Isa 1 GREENLEAF, EVIDENCE § 114a.

8 Woodrum Home Outfitting Co. v. Adams Express Co., 90 W. Va. 161, 165, 110 S. E. 549 (1922) appears to be a holding on the point.

9 Hines v. Patterson, 146 Ark. 367, 225 S. W. 642 (1920); Crawford v. Charleston-Isle of Palms Traction Co., 126 S. C. 447, 120 S. E. 381 (1923); Kumke v. Best Kid Co., 244 Pa. 126, 90 Atl. 538 (1914); Wenquist v. Omaha & C. B. St. Ry. Co., 97 Neb. 554, 150 N. W. 637 (1914). Hines v. Patterson, *supra,* is substantially similar to the principal case. The court held the statement inadmissible as part of the *res gestae* because ''There was no showing that the bystander saw appellee faint or that he was present at the time of the occurrence. For aught that appears, he may have received the information . . . . from thers.'' *Id.* at 376.

10 See 3 WIGMORE, EVIDENCE §§ 1430-1452.

11 See State v. Hood, 63 W. Va. 182, 185, 59 S. E. 971 (1907); State v. Burnett, 47 W. Va. 731, 737, 35 S. E. 983 (1900), wherein the rule is set forth in a dictum cited in State v. Hood, *supra.* See also 3 WIGMORE, EVIDENCE § 1445; 4 ELLIOTT, EVIDENCE (1905) § 3033.

12 See n. 5.

1 186 S. E. 298 (W. Va. 1936).

2 Langdon v. City of Walla Walla, 112 Wash. 446, 193 Pac. 1 (1920); Superior Water, Light & Power Co. v. City of Superior, 174 Wis. 257, 181 N. W. 113; *id,* 176 Wis. 627, 183 N. W. 254 (1922).

The rationale of these cases is that while any attempt by a state to extend its territorial sovereignty into another state would be futile, a distinction exists in the functions of a municipal corporation which will permit the result achieved in these decisions. The division of municipal powers into governmental and proprietary functions is established and well recognized,[3] and the theory is that in the exercise of its proprietary functions a municipality is regarded as having the rights and liabilities of a private corporation[4] and in acquiring property for the establishment of a proprietary enterprise in another state the municipality is not attempting to extend its territorial sovereignty but stands in the same position as would a foreign corporation operating in that state.[5]

Though the West Virginia court cited these two cases with approval, it did not adopt their reasoning as the basis for its decision. Instead, it preferred to place its decision on the basis of "necessity or impelling convenience".

Thus it would seem that the court has both broadened and limited the rule of these two cases; broadening it by allowing a municipality, in the case of necessity, to acquire property in an adjoining state, even in the exercise of a function generally held governmental;[6] limiting it by refusing to allow a city to act outside of the state even in the exercise of a proprietary function unless necessity is shown.

The only objection to a municipality's acting in another state is that the city is thus attempting to extend its territorial sovereign-

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[3] DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §§ 97, 109, 110, 122n, 1638-1646; MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 1946n.

[4] DILLON, *op. cit. supra* n. 3, § 109. ". . . and as to such powers (proprietary) and to property acquired thereunder and contracts made thereunder", the corporation is regarded as having the rights and obligations of a private rather than those of a public corporation. Chrysler Light & Power Co. v. City of Belfield, 58 N. Dak. 33, 224 N. W. 871 (1929); Winona v. Botzet, 169 Fed. 321 (1896).

[5] Langdon v. City of Walla Walla, 112 Wash. 446, 193 Pac. 1 (1920); Superior Water, Light & Power Co. v. City of Superior, 174 Wis. 257, 181 N. W. 113 (1921).

[6] That in arranging for the collection and disposition of sewage a municipality is acting under its police or governmental power to protect the public health, see Stifel v. Hannan, 95 W. Va. 629, 123 S. E. 428 (1924); MCQUILLAN, *op. cit. supra* n. 3, §§ 935-948. Following the trend to abolish governmental immunity in tort, however, scattered cases will be found holding that in the construction and maintenance of sewers a city is acting in its "proprietary" or "private" or "ministerial" function, in order to establish liability. See Ostrander v. Lansing, 11 Mich. 693, 70 N. W. 332 (1897); Detroit v. Corey, 9 Mich. 165 (1862); Donahoe v. Kansas City, 136 Mo. 657, 38 S. W. 571 (1897).

ty into that state. But the mere acquisition of property, construction and operation of a plant, whether in carrying out a governmental or proprietary function, does not of itself interfere with that sovereignty. It is suggested, therefore, that the court, in the instant case, applies a better criterion.

F. P .C.

PLEADING AND PRACTICE — SPLITTING A CAUSE OF ACTION ON INJUNCTION BONDS. — The plaintiff sues on one of two injunction bonds which were executed by the principal defendant with different sureties. In a prior suit the plaintiff recovered the full penalty of one of the bonds, placing in issue all its items of damages, which greatly exceeded the penalty of the bond. The conditions of the two bonds were identical and the same items of damages were tendered in each suit. *Held*, that the plaintiff's recovery on one of these bonds precludes his right to a judgment on the other, he having litigated all his items of damages in the prior action. *State v. Continental Coal Co.*[1]

These statutory[2] bonds were executed as a condition precedent to the taking effect of a preliminary injunction[3] purporting to save harmless the defendant enjoined, from any damages incurred by reason of the injunction in case of its dissolution.[4] In the absence of these bonds there is no common-law liability for such damages unless the injunction was applied for maliciously or without probable cause,[5] and it is suggested that the statute providing for the execution of such bonds does not create any extrinsic liability. It would seem that in the absence of any such extrinsic liability the defendant could be liable only upon the bonds, a separate cause of action accruing on each by the breach of the condition thereof.[6] A person having several causes of action

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[1] 186 S. E. 119 (W. Va. 1936).

[2] W. VA. REV. CODE (1931) c. 53, art. 5, § 9.

[3] Conley v. Brewer, 85 W. Va. 725, 102 S. E. 607 (1920); Meyers v. Land Co., 107 W. Va. 632, 149 S. E. 819 (1929).

[4] See Meyers v. Land Co., 107 W. Va. 632, 643, 149 S. E. 819 (1929).

[5] Glen Jean R. Co. v. Kanawha R. Co., 47 W. Va. 725, 35 S. E. 978 (1900); Notes (1926) 45 A. L. R. 1517; L. R. A. 1916E, 1282; (1916) 14 R. C. L. 479. See State v. Marguerite Coal Co., 104 W. Va. 324, 326, 140 S. E. 49 (1927). In Gorton v. Brown, 27 Ill. 488 (1862) the court held where a bond was required the remedy on the bond was exclusive even though the injunction was obtained maliciously and without probable cause.

[6] Courts have apparently assumed that the breach of the condition of a bond gives rise to a cause of action. Roach v. Gardner, 9 Grat. 89 (Va. 1852); Chicago R. Co. v. Cimarron, 68 Okla. 7, 170 Pac. 909 (1917); White v. Clay's Ex'rs, 7 Leigh 68, 81 (Va. 1836); State v. Pingley, 84 W. Va. 433, 100 S. E.